

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X	<b>Docket#</b>	
UNITED STATES OF AMERICA,	:	10-cr-594 (ERK)
	:	
- versus -	:	U.S. Courthouse
	:	Brooklyn, New York
JOSEPH YANNAI,	:	
Defendant	:	May 11, 2011
-----X		

TRANSCRIPT OF CRIMINAL CAUSE FOR PRETRIAL CONFERENCE  
BEFORE THE HONORABLE EDWARD R. KORMAN  
UNITED STATES SENIOR DISTRICT JUDGE

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1 THE CLERK: United States of America v. Joseph  
2 Yannai.

3 Your appearances, counsel.

4 MR. SPECTOR: Good afternoon, your Honor.  
5 Daniel Spector, Hillary Jager and Audrey Stone for the  
6 government.

7 MS. JAGER: Good afternoon, your Honor.

8 MS. STONE: Good afternoon, Judge.

9 MR. SCHNEIDER: Federal Defenders by Michael  
10 Schneider, Heidi Cesare and Ben Silverman.

11 Good afternoon.

12 MS. CESARE: Good afternoon, Judge.

13 MR. SILVERMAN: Good afternoon, Judge.

14 THE COURT: Okay. Now that we smoked out the  
15 real reason for your speedy trial motion, do you want to  
16 argue your severance?

17 MR. SCHNEIDER: Yes, Judge. The government  
18 added a count of importing an alien for the purposes of  
19 prostitution or other immoral activity.

20 THE COURT: One? One or more?

21 MR. SCHNEIDER: It's one count but they charge,  
22 I believe eight different women.

23 THE COURT: Oh.

24 MR. SCHNEIDER: Up to eight. We don't know  
25 which -- how many --

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1 THE COURT: And so he's so fortunate, he didn't  
2 make it eight counts.

3 MR. SCHNEIDER: That one, you know, maybe --

4 THE COURT: You're getting soft, Mr. Spector.

5 MR. SCHNEIDER: We have been preparing this  
6 case for some months now and Mr. Yannai -- I was  
7 preparing the case with previous counsel to meet a state  
8 court prosecution under the theory that -- the  
9 government's theory that he imported women to come and  
10 live in his house, so that he could forcibly sexually  
11 (indiscernible).

12 This new charge changes that theory and --

13 THE COURT: Is it inconsistent with the rest of  
14 it or is it --

15 MR. SCHNEIDER: It is.

16 THE COURT: I mean is he saying on one side  
17 that they were brought for the purpose of prostitution  
18 and on the other that they were essentially, what  
19 defrauded into coming here? I don't remember --

20 MR. SPECTOR: That --

21 MR. SCHNEIDER: -- the other counts.

22 MR. SPECTOR: Judge, the -- well I don't want  
23 to cut Mr. Schneider off.

24 THE COURT: No, he yields to you.

25 MR. SPECTOR: The facts, the theory, the

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1 evidence, are entirely the same. Our theory from the  
2 beginning has been it was a combination of force and  
3 psychological coercion. And that's consistent with the  
4 other counts and it's consistent with this count.

5 MR. SCHNEIDER: That raises another problem but  
6 for the severance, I don't think --

7 THE COURT: Well is that prostitute -- that  
8 comes under the definition of prostitution?

9 MR. SPECTOR: Our position is not that it is  
10 prostitution.

11 THE COURT: Well that's what they seem to be  
12 suggesting.

13 MR. SCHNEIDER: Right and that's the problem we  
14 have is the statute -- you know, the hundred year old  
15 statute, as we read it and as the Supreme Court  
16 interpreted it, you know, a hundred years ago, requires  
17 an intent that the woman engaged in prostitution or some  
18 other immoral act that is similar to prostitution. And we  
19 don't have that here.

20 And our concern is, look if their argument's  
21 just going to be it's the same as the Mann Act charged,  
22 and we have to prove that he forced these women to have  
23 sex, we wouldn't have a problem. Our problem is when it  
24 gets time for you to charge the jury, under that statute,  
25 we think you have to charge the prostitution theory.

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1 That's what the statute prohibits and that's a completely  
2 different case.

3 THE COURT: Well he says he's not charging  
4 that. I don't understand.

5 MR. SCHNEIDER: Well then --

6 THE COURT: I mean I think the statute is vague  
7 on its face but I assume that it's been narrowed by  
8 judicial construction, so that it survives a vagueness  
9 charge.

10 MR. SCHNEIDER: Well it has been narrowed by  
11 judicial construction to basically the facts of  
12 prostitution or something very similar.

13 THE COURT: Well he you can't prove it, he'll  
14 lose. I mean I don't understand.

15 MR. SCHNEIDER: Well --

16 THE COURT: I won't give it to the jury.

17 MR. SCHNEIDER: Our real concern is we don't  
18 want a theory going to the jury whereby the government  
19 now doesn't have to prove that Mr. Yannai forced these  
20 women.

21 THE COURT: He just said he is not -- well he  
22 said he's not going to offer that. I don't know, what am  
23 I supposed to do now? I take his word for it.

24 MS. CESARE: We think you should sever the  
25 count. It's a different case.

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1 THE COURT: Well I don't know what immoral  
2 purposes is. I mean I don't --

3 MS. CESARE: It's been narrowed to mean  
4 prostitution.

5 MR. SPECTOR: Judge, if I may respond? There's  
6 a Fifth Circuit case on this which was cited in our  
7 papers which in our view directly addresses this  
8 question. And the issue is the conduct must be -- can be  
9 prostitution which we're not alleging here. It can also  
10 be other sexual conduct involving exploitation or  
11 coercion. That's what happened in the Fifth Circuit case  
12 in Clarke and that's what we will allege happened here.

13 THE COURT: Well, if that's what he alleges,  
14 it's not much different from what he is charging already.

15 MR. SCHNEIDER: Well, I --

16 THE COURT: I mean I am going to -- this is  
17 your bill of particulars.

18 MR. SCHNEIDER: I understand, Judge. And we  
19 went through this in front of Judge Orenstein in the  
20 government's made the same representations. To be clear,  
21 our concern is we don't want to have to meet a jury  
22 charge that would allow the jury to convict Mr. Yannai  
23 because the women consented to have sex with him, as he  
24 was paying for their room and board or was giving them  
25 other objects. I think --

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1           THE COURT: I don't know, what did he just say?  
2 That's what I would charge, assuming that's what the  
3 evidence showed. He read from the --

4           MR. SPECTOR: Yeah, it's exploitation and  
5 coercion. And the Court defines sexual exploitation as  
6 to use a person unjustly for one's advantage in a manner  
7 associated with or related to sex. And here we'll prove  
8 that because he used a combination of in some instance  
9 physical force, in other instances exploitation and  
10 coercion; psychological coercion and other forms of  
11 coercion.

12           THE COURT: That's it. I'm not going to charge  
13 the jury anything else.

14           MR. SCHNEIDER: Okay.

15           THE COURT: I mean, as I read your letter, you  
16 withdrew the Speedy Trial Act claim but I don't think it  
17 had any great merit, in any event. I mean by my count,  
18 the trial is going to -- the trial, meaning the jury is  
19 going to be sworn and the case is going to begin on --  
20 twenty-seven days after he was arraigned on this charge  
21 and probably even longer from the date of the indictment.  
22 When was the date of the indictment?

23           MR. SPECTOR: I believe it was more than thirty  
24 days before. I don't have the exact date.

25           THE COURT: So it's even more than thirty days.

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1 The only thing that happened in the interim is that you  
2 had to divert from your preparation was a day for jury  
3 selection. So I don't see that really significant,  
4 particularly in a case which has already been delayed  
5 this long.

6 THE CLERK: The superseding indictment was  
7 filed on April 21.

8 THE COURT: Okay.

9 MR. SPECTOR: Judge, I think we've actually  
10 resolved the next issue which had to do with an exchange  
11 of 3500 material and 26.2 material. I'll let the defense  
12 put on the record they informed me that they do not plan  
13 to call witnesses A, K, G, L or the defendant's mother if  
14 that's the case.

15 MR. SCHNEIDER: The defendant's wife.

16 MR. SPECTOR: The defendant's wife, I  
17 apologize.

18 MR. SCHNEIDER: We're not going to call his  
19 mother either.

20 MR. SPECTOR: If that is, in fact, the case  
21 we're prepared to provide our 3500 material either  
22 tonight or tomorrow morning.

23 THE COURT: Okay. Good.

24 MR. SCHNEIDER: That is the case. And for the  
25 record, we had no 3500 or 26.2 material for one of the



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1 complaining witnesses but we don't intend to call either  
2 at this point.

3 MR. SPECTOR: I should say, I'm sorry this --  
4 my understanding is that the two victims are under  
5 defense subpoena. One of them has an attorney who we've  
6 informed the defense about, so I assume they're going to  
7 notify those witnesses that they're not going to be  
8 subpoenaed by the defense -- going to be called by the  
9 defense.

10 MS. CESARE: Well it's difficult for us to --  
11 we can contact Mr. Fodeman to release his witness but the  
12 other witness is difficult for us to contact, so perhaps  
13 the government could communicate to her that we release  
14 her from that subpoena.

15 THE COURT: Okay.

16 MS. CESARE: We don't have easy access to that  
17 witness.

18 THE COURT: Give him the subpoena and ask him  
19 to serve it.

20 MR. SCHNEIDER: No, the subpoena's been served.

21 THE COURT: Oh.

22 MR. SCHNEIDER: They're asking about whether  
23 we'll release the --

24 THE CLERK: You withdraw.

25 MR. SCHNEIDER: And we will but we can't find

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1   them to release them.

2               THE COURT:  Oh, oh.  I see.  Well, he could --  
3   he'll be more than happy to arrange for that.

4               MR. SPECTOR:  Fine, Judge.

5               MS. CESARE:  What time tonight do you  
6   anticipate releasing that material?

7               MR. SPECTOR:  It depends on our paralegal.  If  
8   we're ready tonight, we'll let you know as soon as it's  
9   ready.  Otherwise, first thing tomorrow morning.

10              MR. SCHNEIDER:  Is it going to be electronic  
11   or --

12              MR. SPECTOR:  No, it's not going to be  
13   electronic.

14              THE COURT:  When the sun sets.

15              MR. SCHNEIDER:  We do have an outstanding  
16   request for Brady material.  It's our view that any  
17   statements taken by women who lived in a house --

18              THE COURT:  Taken by or from?

19              MR. SCHNEIDER:  From; sorry, taken from -- made  
20   by these women, especially any that indicate that they  
21   didn't notice any coercion or any forcible sex acts  
22   taking place in the house because most -- there is rarely  
23   just one woman living in the house.  There's usually more  
24   than one.  That that is Brady material.  It exculpates  
25   our client.

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1 MR. SPECTOR: Judge, they're getting all of  
2 that material anyway. The 3500 has every ROI from the  
3 case agents. So they'll have all those interviews.

4 THE COURT: Okay.

5 MR. SCHNEIDER: We also think that any  
6 documents in the government's control that include e-mail  
7 messages from any of the women to their family, if the  
8 government has those documents and they indicates that  
9 there was no coercion or force, those would be Brady  
10 material, as well.

11 MR. SPECTOR: Well --

12 THE COURT: What do you mean? You have to be  
13 more specific.

14 MR. SCHNEIDER: We believe that as for  
15 government perhaps not a witness but a woman who they've  
16 interviewed, if they somehow have in their possession e-  
17 mail messages from that woman to somebody else indicating  
18 here I am in New York. I'm having a great time. Joseph  
19 is a good guy. Tonight we're going to the theater. That  
20 would be Brady material.

21 MR. SPECTOR: Judge, I think we're really  
22 getting far, far beyond any line of Brady. We've already  
23 been incredibly generous frankly in what we've given them  
24 and I think we need to make a distinction between the  
25 witnesses who are testifying, who we're going to be

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1 relying on in court. Obviously we'll give over all those  
2 documents described including e-mails --

3 THE COURT: I don't know why --

4 MR. SPECTOR: -- that's 3500 material.

5 THE COURT: -- you have to play it so close to  
6 the vest. There's a separate -- just because something  
7 may be Brady material or helpful to the defense, I mean  
8 the reality is that -- I mean the law is that Brady  
9 material is evidence that could more likely than not,  
10 result in a different outcome. But, you know, first of  
11 all you roll the dice when you rely on that but I don't  
12 know why you have to play it so close to the vest. I  
13 started to say the fact that it may be Brady material  
14 doesn't mean it's admissible.

15 MR. SPECTOR: Judge, if I may just clarify  
16 that. With all due respect, we're not playing anything  
17 close to the best. We are giving them everything as to  
18 every testifying witness.

19 THE COURT: I know but what he asked for is  
20 reasonable whether it's admissible is a separate story.

21 MR. SPECTOR: Well, it's not a question of  
22 admissibility, Judge. We're also giving them all the  
23 statements from every woman, whether they're testifying  
24 or not. But what is completely irrelevant is a woman who  
25 he had a consensual sexual relationship with who lived in

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1 his home who we're not seeking to rely upon, her e-mails  
2 are totally irrelevant. That's no more relevant than the  
3 fact that he had sex with his prom date in high school.  
4 That's not part of the case.

5 THE COURT: I'm not arguing admissibility now.  
6 I can worry about that at the time but I don't see why  
7 you can't give it to him.

8 MR. SPECTOR: Judge, that puts a tremendous  
9 burden on us to go back and look at e-mails that we  
10 haven't focused on because we're not calling those  
11 witnesses. I don't want to be responsible for making a  
12 representation that the government has turned over a  
13 universe of documents that we're not focused on. We're  
14 giving him the statements from those witnesses. I think  
15 that's more than sufficient.

16 MR. SCHNEIDER: But it's not a concern that --  
17 I understand the government's argument that because some  
18 woman had consensual sex doesn't mean that others weren't  
19 forced, although I think it's more relevant than they  
20 concede. Our problem is those women are witnesses to  
21 what the government says is a coercive environment and  
22 abuse of the other women in the house at the same time.

23 THE COURT: But they're not calling them as  
24 witnesses.

25 MR. SCHNEIDER: Right. But if there are

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1 statements saying -- of living in the house with one of  
2 the complaining witnesses --

3 THE COURT: Look, this strikes me as being  
4 analogous to cases where there has been eyewitness  
5 identifications by some people and then other witnesses  
6 couldn't make an identification and I'm reasonably  
7 certain that the evidence that other people are unable to  
8 make identification was held to be -- you know, you  
9 should turn it over. I'm not saying I'm going to admit  
10 it.

11 MR. SPECTOR: Judge, just to be clear, to the  
12 extent we have information where victim -- let's say  
13 there's victim number one and --

14 THE COURT: You must have gone through all of  
15 this stuff --

16 MR. SPECTOR: Judge.

17 THE COURT: -- in order to determine what to  
18 charge and what not to charge.

19 MR. SPECTOR: If there's anything that could be  
20 construed as Giglio, anything that would contradict one  
21 of the witnesses we're calling to testify, we're turning  
22 that over. But there are many times where there are  
23 victims who are at the home who are not contemporaneous  
24 with any of the victims we're relying upon.

25 The fact that those victims sent e-mails to

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1 various people --

2 THE COURT: So that would be -- you know, from  
3 what you're describing, I wouldn't admit it but that I --  
4 you know, I try to tell you that the definition of Brady  
5 material does -- I mean, I am reasonably certain because  
6 I think for other purposes I just happen to be reading it  
7 that the fact that something is Brady material doesn't  
8 mean it has to be admissible.

9 MR. SPECTOR: Judge, frankly I don't even know  
10 that we have any of those e-mails.

11 THE COURT: Well, you can't turn over anything  
12 that you don't have.

13 MR. SPECTOR: I don't want to be responsible  
14 for undertaking a project now where we have to go and  
15 review everything again.

16 THE COURT: Well I don't know. Write me a  
17 letter of how big a deal this is. You know, I would  
18 assume that he would have gone through it anyway.

19 MR. SPECTOR: Not as to witnesses that we're  
20 not focusing on, Judge.

21 THE COURT: Well you would have gone through  
22 it, it seems to me, to determine who were going to be the  
23 victims that you were going to charge.

24 MR. SPECTOR: We're talking about victims that  
25 we're not relying upon.

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1 THE COURT: You know, I understand that. What  
2 I am saying is it seems to me you would have gone through  
3 that in preparing the case to see whether or not there  
4 were other victims that you might not have been aware of.

5 MR. SPECTOR: Certainly.

6 THE COURT: And so you would have gone through  
7 those e-mails in any event. And I don't know, you know,  
8 I've read -- there was a story in the Times about the  
9 digitizing of documentary materials which indicates that  
10 it's not such a terrible ordeal to do a document search.

11 MR. SPECTOR: Well, it's -- I think -- Judge,  
12 let me say this. We'll attempt to undertake a review.

13 THE COURT: Good.

14 MR. SPECTOR: To the extent that there's  
15 anything that is Giglio as to the ones who were  
16 testifying, that's getting turned over. To the extent  
17 that there is not, if we think that there's an issue,  
18 we'll come back to the Court. I don't know that there  
19 even exists this other universe.

20 THE COURT: I know you don't know.

21 MR. SPECTOR: I just -- I'm a little  
22 uncomfortable to make a representation about that.

23 THE COURT: I understand. So you've got time.  
24 You told me months ago that you were ready for trial.

25 MR. SPECTOR: We are ready for trial.



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1           THE COURT: Yes, but in the meantime you filed  
2 a superseding indictment and did a lot of other things  
3 from the time you told me you were ready to go that  
4 second. Okay.

5           MR. SPECTOR: I think the next issue, Judge, is  
6 our application to have the victims referred to by first  
7 name only.

8           MS. JAGER: Your Honor, our papers set forth  
9 our position which is that the government respectfully  
10 requests that the victims be referred to by their first  
11 name, is with respect to the defendant's response to our  
12 motion.

13           MR. SCHNEIDER: We said no. Our concern is not  
14 only the infringement of Mr. Yannai's confrontation  
15 rights. It's really our concern is the infringement of  
16 his Fifth Amendment right to due process, to be presumed  
17 innocent.

18           We're not going to ask the witnesses where  
19 exactly they live, where exactly they work, where exactly  
20 they go to school. We're not interested in that.

21           THE COURT: So what is your concern, the fact  
22 that they don't give their second name, the jury will  
23 draw some inference that --

24           MR. SCHNEIDER: Yes, the jury will draw some  
25 inference that the Court has made a conclusion that these

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1 women are victims and thereby their last names shouldn't  
2 be used. And to be honest --

3 THE COURT: Well why don't we give them  
4 pseudonyms?

5 MR. SCHNEIDER: Look, if it could work and the  
6 jury wouldn't know that they were being treated  
7 specially, it wouldn't be a problem.

8 THE COURT: Well when you pick --

9 MR. SCHNEIDER: I don't understand the  
10 government's concern here. We know their names. There's  
11 no concern, safety concern from our client or us knowing  
12 their name. They --

13 THE COURT: And newspapers don't publish the  
14 names.

15 MR. SCHNEIDER: And newspapers don't publish  
16 the names. So I don't understand the government's  
17 concern at all. And the other problem is I certainly  
18 don't want to be in a position of cross-examining a young  
19 woman and calling her by her first name. I think it's  
20 inappropriate.

21 THE COURT: I wasn't talking about that. I had  
22 suggested a pseudonym.

23 MR. SCHNEIDER: I understand but that was --

24 THE COURT: It could be something more  
25 imaginative than Roe and Doe.

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1 MR. SCHNEIDER: Right. We could do Ms. Black  
2 and Ms. Pink and Ms. Brown but it's not --

3 THE COURT: No, go to the telephone book and  
4 pick out names, whatever you like. If that's what your  
5 concern is. I'm trying to address your concern --

6 MR. SCHNEIDER: That is my concern.

7 THE COURT: If you just want to make it tough  
8 for the government, that's another story but --

9 MR. SCHNEIDER: I don't. I just don't  
10 understand the government's concern. It's not -- we'll  
11 call them by their names. The press won't report it, we  
12 know that. I don't understand what the problem is. We  
13 already know their names.

14 MS. JAGER: Your Honor, the concern is their  
15 privacy. They are women who are going to be testifying  
16 about you know sexual acts that they --

17 THE COURT: But that happens most of the time,  
18 I think in most cases of this genre, the victims give  
19 their names in open court.

20 MS. JAGER: Sometimes the Court makes  
21 accommodations for them in order to either use a  
22 pseudonym as your Honor has suggested or to just use a  
23 first name or to use initials.

24 THE COURT: Well, we're not going to use the  
25 first name but I am willing to use a pseudonym. And I'll

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1 take a -- give me some cases that say that I can do this.

2 MR. SPECTOR: Judge?

3 MS. JAGER: The only problem with using the  
4 pseudonym is some of the women overlapped with each other  
5 and they'll be referring to one another. And so it would  
6 be confusing for them to have to use a name for somebody  
7 that they --

8 THE COURT: Well look, the problem is --

9 MS. JAGER: -- don't know.

10 THE COURT: -- that at some point --

11 MS. JAGER: Another suggestion --

12 THE COURT: Look, nobody is more sensitive to  
13 privacy interests than I am. I mean I have written  
14 opinion allowing people to file civil suits under their  
15 -- using initials. I've written an opinion reversing a  
16 magistrate on this automatic notion of giving out Social  
17 Security numbers at depositions. I don't believe that  
18 people should be forced. I think the -- having all this  
19 stuff online really forces people to give up privacy  
20 rights that -- in order to vindicate whatever legal  
21 rights that they have.

22 But on the other hand, I think look, this is a  
23 criminal case and generally, you cut it in favor of the  
24 defendant's right to a fair trial. Now if you've got  
25 cases, I'll look at them but my inclination right now is

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1 I have a vague recollection of a case that Justice Fordes  
2 (ph.) wrote. I don't know -- that --

3 MS. JAGER: May we just have a moment,  
4 your Honor?

5 THE COURT: Maybe it dealt with addresses.  
6 That's a different story.

7 MR. SPECTOR: That's fine, Judge. We'll confer  
8 and perhaps I will withdraw the application.

9 THE COURT: Okay.

10 MR. SCHNEIDER: The next --

11 MR. SPECTOR: I think the two next issues  
12 actually have been resolved. We had made a motion to  
13 preclude use of certain photographs. The defense has  
14 represented they're not seeking to use those and we had  
15 made a motion to preclude reference to the victim's  
16 sexual histories as to third-parties and the defense has  
17 represented they're not seeking that information.

18 MR. SCHNEIDER: That is correct, although there  
19 is one issue that has arisen since we responded to that.  
20 We provided notice that we intend to elicit testimony  
21 about the complaining witnesses sexual conduct with Mr.  
22 Yannai. There may have been -- I don't know exactly who  
23 the government's witnesses are going to be. There may  
24 have been sexual contact between the witnesses, between  
25 the women. And that may become relevant. But other than

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1 that, we have no --

2 THE COURT: On the basis of that generality, I  
3 can't do anything. When the time comes, I'll rule on it.

4 MR. SCHNEIDER: Okay.

5 MR. SPECTOR: So I think the next issue is our  
6 404(b) application.

7 THE COURT: What is that?

8 MR. SPECTOR: We had --

9 THE COURT: I don't like in limine rulings. I  
10 don't like to make rulings when I don't have a feel for  
11 the case. And most of the time, it's not necessary to  
12 refer to it in opening statements but let me hear what  
13 you want to --

14 MR. SPECTOR: Certainly, Judge. We've learned  
15 that in 1992, the defendant engaged in virtually  
16 identical conduct with another victim. This is a woman  
17 who was nineteen years old that the defendant hired to  
18 live in his home and work for him. And who she reports,  
19 suffered exactly -- exactly the same type of situation.  
20 He pressured her for sex. Repeatedly castigated her.  
21 She reported that he groped her breasts and groped her  
22 buttocks and that she was afraid to tell him that she was  
23 refusing his sexual offers.

24 Although it is old, we think under the  
25 circumstances it's critical evidence for the government

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1 for a number of reasons. First of all, as I think has  
2 already been made clear, the defendant apparently is  
3 going to concede that much of the sexual that the victims  
4 are going to describe took place. He's going to argue  
5 that it was consensual.

6 And particularly under those circumstances,  
7 where the issue is the defendant's mens rea, the Courts  
8 have held the 404(b) evidence particularly appropriate to  
9 show the defendant's intent. In addition, to the  
10 extent --

11 THE COURT: Well, where the argument is that  
12 it's consensual, whose mens rea is at issue?

13 MR. SPECTOR: Well, it's the defendant's intent  
14 to commit the crimes. I mean it would also be the  
15 victim.

16 THE COURT: But whether it's consensual depends  
17 on the victim's state of mind.

18 MR. SPECTOR: Well I think it's both, frankly,  
19 but --

20 THE COURT: Well, okay.

21 MR. SPECTOR: But I think it -- however you  
22 slice it, this is relevant to that determination because  
23 it shows that this is a situation where it goes to show  
24 that the defendant did not intend to have consensual  
25 sexual conduct but rather intended to have it not be

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1 consensual.

2 In addition, it's classic modus operandi  
3 evidence. It's striking actually how identical the  
4 conduct is. There's a recent Second Circuit case that we  
5 cited Curley (ph.), I think it just came out a couple of  
6 weeks ago, that held that even where evidence is old,  
7 actually even older than in this instance, I think in  
8 Curley it was fifteen years prior to the charged conduct,  
9 that the fact that it was old was not a bar to its  
10 admission.

11 And I think that the -- where you're talking  
12 about the context of sexual assaults, the age of the  
13 prior incident really should not be a bar and there's a  
14 line of cases under Rule 413 to that effect that we've  
15 cited in our papers. While we're not seeking its  
16 admission under Rule 413, I think that that --

17 THE COURT: Well what are you seeking it under?

18 MR. SPECTOR: Under 404(b).

19 THE COURT: As modus operandi.

20 MR. SPECTOR: As intent showing lack of  
21 accident, mistake, and modus operandi.

22 THE COURT: And --

23 MR. SPECTOR: Judge, one other point.

24 THE COURT: I have intent to deal with Rule 412  
25 or 413 but isn't prior similar -- doesn't that create an



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1 exception for prior similar acts in sexual assault cases?

2 MR. SPECTOR: It does, your Honor. It's a bit  
3 of a technical exception here because 413 defines -- if I  
4 can just have one moment to find the note, it defines  
5 that the framework for 413 is an offensive sexual  
6 assault and the groping that he committed against this  
7 victim nineteen years ago does not technically fall  
8 within the definition. So we're not seeking it under  
9 Rule 413.

10 But nonetheless, I think the congressional  
11 intent --

12 THE COURT: There is in 413 a definition of  
13 sexual assault, is that it or is the Court -- has the  
14 Court's interpreted that?

15 MR. SPECTOR: I believe it's within the  
16 statute, your Honor.

17 THE COURT: Okay.

18 MR. SPECTOR: In any event, I --

19 THE COURT: I'm sure if you say so, I can rely  
20 on it.

21 MR. SPECTOR: The -- nonetheless, congressional  
22 intent in passing 413, I think is instructive here in the  
23 way that courts have interpreted the rule in that  
24 particularly in sexual assault cases where defendants  
25 engage in this type of behavior even over a long period

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1 of time in the past, it's still quite relevant and  
2 instructive as to their mental state with respect to the  
3 charged crime.

4 MS. CESARE: May I ask a question on a proffer  
5 level? Is there an allegation that Mr. Yannai had sexual  
6 relations with this woman?

7 MR. SPECTOR: No.

8 MS. CESARE: That they had sex?

9 MR. SPECTOR: No, it's groping.

10 MR. SCHNEIDER: Right.

11 MR. SPECTOR: It's what all of our witnesses  
12 are going to testify to, as well.

13 MR. SCHNEIDER: Section 413 defines sexual  
14 assault as certainly more than groping. It refers you to  
15 a statute.

16 MR. SPECTOR: I apologize. There's just one  
17 other thing I need to clarify about the --

18 MR. SCHNEIDER: Okay.

19 THE COURT: I'm going to deal with this at  
20 trial. I'm not going to make an in limine ruling. You  
21 don't have to get into it in your opening statement. I  
22 want to get -- I need to get a grasp of the trial and the  
23 case that I don't have in an in limine. I hate these  
24 motions because of the reason that I just don't have a  
25 feel for the case. I can't make a judgment. I mean, one

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1 of the judgments that I make is based on, you know, the  
2 nature of the case. How much -- to what extent there's  
3 prejudice, to what extent the government really needs it.  
4 Of course when I was in your shoes, I'd argue with  
5 Judge Weinstein all the time about that issue. He's  
6 always say, what do you need it for? So, I can't make  
7 that judgment in this --

8 MR. SPECTOR: We won't open on it, Judge.

9 THE COURT: -- in a vacuum.

10 MR. SPECTOR: I think that's all of our --  
11 that's the entirety of our motion.

12 MR. SCHNEIDER: Well, we have a couple of  
13 issues. The first is that there is a -- and this may be  
14 the same class of objection you want to deal with later  
15 but there's an incident where one of the named victims  
16 traveled with Mr. Yannai to Michigan and during that trip  
17 -- the government alleges that Mr. Yannai sexually  
18 assaulted the named complainant in a hotel room in  
19 Michigan, I believe.

20 The facts of that encounter are that Mr. Yannai  
21 also had sex with a sixteen-year-old girl, which is not a  
22 crime. A sixteen-year-old can consent in Michigan. And  
23 it was our concern that any evidence or testimony  
24 concerning that encounter between Mr. Yannai and a  
25 sixteen-year-old girl would be so prejudicial that it

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1 would need to be excluded from evidence.

2           The government has responded and said they  
3 don't intend to elicit that evidence. So I think we can  
4 leave it at that for now.

5           The other issue is that Mr. Yannai --

6           MS. JAGER: Just to be clear though, are you  
7 moving on to your second issue in your motion?

8           MR. SCHNEIDER: Yeah.

9           MS. JAGER: I just wanted to be clear that we  
10 agreed we're not going to go into the age or the presence  
11 of any third party at all, but to the extent that the  
12 defense opens the door to that on cross, we think it's  
13 important that her age is revealed, so that there's not a  
14 distorted picture of what happened that night.

15           THE COURT: Tell him what you mean by opening  
16 the door and then we'll deal with it at trial.

17           MS. JAGER: Well, we plan to elicit testimony  
18 between the defendant and the identified witness Dias  
19 (ph.). There will be no mention of any third party being  
20 present for that encounter. To the extent they ask  
21 whether or not somebody else was there, anybody else was  
22 in the room or anybody else participated, it would be our  
23 position that that would open the door to tell the full  
24 story that would include the age of the third party who  
25 was present, not giving he name -- I mean, excuse me, not

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1 giving her age but give a distorted picture of what  
2 happened and would suggest perhaps that there were three  
3 consenting adults. But we agree, we're not going to  
4 mention her age or mention her presence.

5 MR. SCHNEIDER: I think we should -- I'm sorry,  
6 I think we should address this closer to the time of  
7 trial. Maybe we need a -- we might think it's relevant  
8 to ask if there was another person present. We wouldn't  
9 think that that opens the door but we would ask the Court  
10 before we ask that.

11 THE COURT: It doesn't strike me that that  
12 would open the door but again, I just don't want to  
13 decide this in a vacuum.

14 MR. SCHNEIDER: The last issue, the government  
15 has provided us in their exhibit list hundreds or  
16 thousands of pages related to an au pair questionnaire  
17 that Mr. Yannai was sending out to women. We have over  
18 -- the government's file is over 6,000 of these  
19 questionnaires. They're related --

20 THE COURT: That was of the 9,000 documents,  
21 this was --

22 MR. SCHNEIDER: Yes, this was many of them --

23 MR. SPECTOR: Most of them.

24 THE COURT: It was easy for you. You didn't  
25 take a --

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1 MR. SCHNEIDER: We had to cull each of them.  
2 Anyway, this was research for a book that Mr. Yannai was  
3 researching. He has published other books in the past.  
4 We don't think it's relevant to any issue at trial. We  
5 think that it would be confusing to the jury.

6 The government apparently intends to argue that  
7 this was evidence that Mr. Yannai was creating a list of  
8 future women he could abuse. If that's their argument, I  
9 think it runs afoul of 404(b) as an other act unrelated  
10 to these acts. And it's especially so --

11 THE COURT: Well, it would be part of the same  
12 common scheme or plan but again I don't want to have to  
13 rule on this now unless it's somehow critical.

14 MR. SCHNEIDER: No, the only issue I would  
15 raise is that none of the women that they're going to  
16 call were contacted in this way. None of them got this  
17 questionnaire. So --

18 THE COURT: Oh, none of them got this  
19 questionnaire.

20 MR. SCHNEIDER: No, he contacted them through  
21 the internet.

22 MS. JAGER: Your Honor, it is the government's  
23 position we'd like to be able to open on this evidence.  
24 This isn't -- our theory is not that the defendant was  
25 using this necessarily to create a list of future

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1 victims. The way our -- as explained in our papers, he's  
2 using this as -- the au pair questionnaire as this  
3 research to learn about women who are interested in  
4 coming to the United States as au pairs. Our position is  
5 not that he was going to write a book and the defense can  
6 argue otherwise but that he was using this au pair to  
7 gather --

8 THE COURT: No, they say he was going to write  
9 a book.

10 MS. JAGER: Right. And they can argue that and  
11 it will go to the weight of the evidence, not the  
12 admissibility of the evidence. And it's our position  
13 that it goes to his intent, to his planning, to his  
14 scheme. He's using the same au pair websites to contact  
15 his actual -- or our victims as he was using to send the  
16 questionnaire to. When he then poses as the previous  
17 employer, he asks very specific -- excuse me, as the  
18 previous employee, he uses very similar questions and  
19 asking them about themselves.

20 THE COURT: Did anybody respond to these that  
21 you just -- that you want to offer?

22 MS. JAGER: Hundreds of women. And it was  
23 based on those answers, it's our position, that he was  
24 able to gain information about the types of women who  
25 took these jobs, with the things they looked for in

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1 employers, whether or not they had families, whether or  
2 not they had support networks and learning what types of  
3 women would potentially be potential victims for him.

4 And he catalogued all of this information in a  
5 very extensive Excel spreadsheet. And it's our position  
6 that this is very relevant, critical evidence to the  
7 government.

8 MR. SCHNEIDER: I just note that none of their  
9 complaining witnesses who they intend to call as a  
10 witness was sent a questionnaire. None of them were  
11 contacted in this way. So they're analogizing -- and in  
12 fact, most of the women who they call victims were  
13 involved with sending out these questionnaires and  
14 collating these answers. That's some of the work they  
15 were doing.

16 It's not particularly relevant except in a sort  
17 of illegal 404(b) way for them to argue like look and  
18 look, he was going to do it to all these women, too. I  
19 would concede the relevance if he had sent this  
20 questionnaire to some of their named complainants but he  
21 hadn't.

22 THE COURT: Well, I mean there could be a  
23 stipulation that there was -- that he didn't -- I forget,  
24 he did or did not have subsequent contact with women who  
25 filled out this questionnaire?



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1           MR. SCHNEIDER: I can't answer that. Not that  
2 we're aware of. I mean he -- they were collating the  
3 information. I'm not aware of him contacting any of them  
4 but I haven't discussed that with him and I don't have  
5 any of the e-mails the government would have.

6           THE COURT: Well, if that's your concern, you  
7 could come in with a stipulation that there's no evidence  
8 that he ever contacted any of the people who got these  
9 questionnaires.

10          MR. SPECTOR: I don't know that that's true,  
11 Judge. I think I see --

12          THE COURT: Well, you know I am -- I only know  
13 what I know.

14          MR. SPECTOR: As to -- if his point is that the  
15 -- I'm sorry. If the defense point is that particular  
16 victims didn't fill out the questionnaire, he can cross-  
17 examine the particular victims as to that issue. But  
18 this is critical evidence as to the defendant's intent.  
19 He's honing his craft so-to-speak in that he's  
20 determining the types of victims based on response of --

21          THE COURT: Well, first find that out. I don't  
22 have to decide this today. Find out if any of these  
23 people, he actually contacted them.

24          MR. SPECTOR: Well I mean --

25          THE COURT: I mean you don't know.

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1 MR. SPECTOR: He definitely contacted them in  
2 that there were e-mail exchanges where they filled out  
3 the questionnaires. That was part of the contact.

4 THE COURT: Yes, but after they filled out the  
5 questionnaires, did he ever get in touch with them again?

6 MS. JAGER: We haven't undertaken calling over  
7 hundreds and hundreds of women to determine whether or  
8 not he followed-up with any or all of them. As  
9 Mr. Spector pointed out, the defense is free to question  
10 the victims and the witnesses about whether or not they  
11 were contacted this way.

12 THE COURT: Well how does it hurt you to  
13 stipulate that there's no evidence that he contacted any  
14 of the people who got this question -- the questionnaires  
15 that you want to offer?

16 MR. SPECTOR: Well, we'd have to determine  
17 whether that's true or not.

18 THE COURT: Well, you don't have to determine  
19 whether it's true. You could stipulate to something even  
20 if it's not true. But I mean I wouldn't report you.

21 I'm just trying to figure out practical ways to  
22 deal with this problem.

23 MR. SPECTOR: Can we just have a moment, Judge?  
24 (Counsel and client confer)

25 THE COURT: Anyway, it wouldn't be not true if

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1 you don't know. You're just stipulating that there's no  
2 evidence which would be true.

3 MR. SPECTOR: We'll look into it. If we can  
4 confirm that, we'll agree to the stipulation.

5 THE COURT: Okay.

6 MR. SCHNEIDER: That's the last issue, although  
7 it is our position that the au pair questionnaires are  
8 irrelevant and prejudicial. But the government's  
9 argument --

10 THE COURT: I don't know if they're --

11 MR. SCHNEIDER: -- is the illegal 404(b)  
12 argument.

13 THE COURT: You know the definition of  
14 relevance in the Federal Rules of Evidence is extremely  
15 broad, whether their relevance is outweighed by the  
16 prejudicial effect is another story.

17 MR. SPECTOR: I've been asked about the length  
18 of the trial. We told the jury three weeks which I think  
19 is an outside estimate. We're hoping it will be done in  
20 two. It's a little hard to predict because we don't know  
21 how long the cross-examinations are going to go.

22 THE COURT: All right. I may have to take a  
23 break in the trial for a couple of days because of the  
24 Second Circuit judicial conference if it goes beyond --

25 (Pause.)

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1 MR. SPECTOR: I'm sorry?

2 THE CLERK: The first full week in June is  
3 problematic.

4 MR. SPECTOR: That's the week of June 4 --

5 THE CLERK: June 6. Just to make sure that you  
6 all understand that the magistrate who was selecting the  
7 jury, the clerk called me and I hope they made it  
8 perfectly clear since May 30 is a federal holiday, we  
9 will not be sitting the previous Friday because that's  
10 normally not our day to sit on trial.

11 MR. SCHNEIDER: Yes.

12 THE CLERK: We will make up the Monday trial  
13 date on Friday, June 3. So we're sitting that day for  
14 trial.

15 MS. JAGER: Judge Pollak did make that clear.

16 MR. SCHNEIDER: If the government intends to  
17 open on the au pair questionnaires, we would like to know  
18 that ahead of time, so we can address it.

19 THE COURT: Well, we've just said that he's  
20 going to first look into see --

21 MR. SCHNEIDER: I understand. I understand.  
22 The other issue is we have eight identified complaining  
23 witnesses. We would like the government to tell us which  
24 ones are going to testify so that we don't have to waste  
25 time preparing for ones that aren't going to testify and

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1 based on their papers, it appears they're not going to  
2 call all of them.

3 MR. SPECTOR: It's a decision that we'll make  
4 during the course of the trial.

5 MS. CESARE: Are there any witnesses they've  
6 decided now that they're not going to call?

7 MR. SPECTOR: I just don't think it's  
8 appropriate for us to be put in a position of having to  
9 commit to who we're calling and who we're not calling.

10 MR. SCHNEIDER: We're just asking that they  
11 tell us if they're definitely going to call somebody.

12 THE COURT: Well forget about who they're not  
13 calling. You could commit to who you're calling.

14 MR. SPECTOR: No, there's no one who we have  
15 categorically eliminated.

16 THE COURT: I know but there's others that  
17 you've categorically decided to call.

18 MS. JAGER: But then that would put everyone --

19 MS. CESARE: Who are you definitely calling?

20 THE COURT: That way there's no prejudice if  
21 you don't call them, you don't call them.

22 MR. SPECTOR: I'm not comfortable with making  
23 that representation now, Judge, I'm sorry.

24 THE COURT: You're not comfortable? What does  
25 that mean?

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1 MR. SPECTOR: I don't want to be boxed into a  
2 position of promising we are or are not going to call  
3 certain witnesses.

4 THE COURT: What do you mean boxed in? What's  
5 going to happen to you if you say you're calling X and  
6 you don't call X? What do you think is going to happen?

7 MR. SPECTOR: Okay. I think the only one in  
8 serious question is witness A.K. That's the only witness  
9 who we have serious doubts about calling.

10 THE COURT: Okay.

11 MR. SPECTOR: Again, with the caveat we may  
12 call her.

13 THE COURT: With the caveat you may call her.  
14 I won't hold you in contempt.

15 MR. SPECTOR: Just one other housekeeping  
16 matter, actually two. Can we just get a little  
17 clarification on what happens on the week of June 6 if  
18 we're still going?

19 THE COURT: Well, we're going to work on June  
20 6. If necessary, I might work on June 7 because I -- you  
21 know, the Second Circuit Judicial Conference is so short  
22 and so far away that if I just went for the Second  
23 Circuit Judicial Conference alone, it would be one full  
24 day and the other two days would be traveling five hours  
25 to Lake George. So what I would like to do normally is

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1 to go up a day early, so I have at least two days equal  
2 to the two days that I have to travel. But beyond that,  
3 on the 6th, there's the Brooklyn Law School commencement  
4 but that's not a whole day affair. And if need be, I  
5 mean that's just a couple of hours that I have to slip  
6 away for. I'm on the board of trustees and I was  
7 instrumental in getting the commencement speaker. So I  
8 would at least like to be there for the commencement  
9 address. But that's not -- it's actually -- my  
10 recollection is that it may even be in the morning. So  
11 that would be even better. This way there won't be any  
12 disruption. My recollection is that the commencement is  
13 in the morning which means we won't have to disrupt the  
14 day. I will simply tell the jury to come in at a  
15 particular time and I won't need to have a two hour break  
16 or a two and a half hour break. That's up at Lincoln  
17 Center is where the commencement is. So if it's in the  
18 morning, which is what my recollection is, it would make  
19 it simpler.

20 MR. SPECTOR: Okay. And we normally start at  
21 10 a.m.; is that right?

22 THE COURT: I don't know if there's a normal  
23 starting time.

24 THE CLERK: We should try.

25 THE COURT: We'll try. I generally prefer to

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1 work late as opposed to starting early.

2 MR. SPECTOR: And is there a time we generally  
3 end by?

4 THE CLERK: Just figure 6:30.

5 THE COURT: Well, look at this way, I don't run  
6 the court by the clock. If I think I can finish a  
7 witness by working an extra half hour, I will. It's sort  
8 of a rule of thumb. Even in the summer -- in the winter,  
9 I'm concerned about the jurors walking out here late  
10 because as you know, the place is deserted. In the  
11 summer, I don't have that concern.

12 On the other hand, I don't like to keep them  
13 too late because they have to commute and I don't -- some  
14 of them have distances. I don't want them to get home at  
15 9 o'clock but my rule of thumb is I don't run the trial  
16 by the clock and as I say, if I feel I can make progress  
17 by working a half later or forty-five minutes later, even  
18 an hour later, I'll do it.

19 A lot of times, people tell me, you know, we  
20 don't have any more witnesses. We move too fast. And  
21 there's a general tendency to over estimate how long  
22 things will take.

23 THE CLERK: Plan to have enough witnesses for 7  
24 o'clock.

25 MR. SPECTOR: Thank you, Judge.



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1 MS. JAGER: Thank you, Judge.

2 MR. SPECTOR: One other -- I'm sorry, just one  
3 other matter. I think we'd request when we see the jury  
4 on Monday that you instruct --

5 THE COURT: When we see the jury Monday?

6 MR. SPECTOR: Next Monday.

7 MR. SCHNEIDER: A week from Monday.

8 THE COURT: Yes.

9 MR. SPECTOR: Instruct them specifically about  
10 not posting anything on Facebook or any other kind of  
11 social networking site about the trial. Several jurors  
12 said they're on Facebook. It seems commonsensical but I  
13 think it's appropriate just to reiterate that.

14 THE COURT: Did the magistrate tell them that,  
15 too?

16 MR. SPECTOR: She didn't say that explicitly.  
17 She told them not to do any research or to --

18 THE COURT: Write out what you want me to tell  
19 them and I'll include it in my opening instructions to  
20 the jury.

21 MR. SPECTOR: Thank you, Judge.

22 MS. CESARE: Thank you, Judge.

23 MR. SPECTOR: Thank you, Judge.

24 THE CLERK: See you on the 23rd, counsel, at 10  
25 a.m.

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1 MR. SPECTOR: Thank you.

2 THE CLERK: So we can get everything set up and  
3 ready to rock and roll.

4 MR. SPECTOR: Thank you.

5 MS. CESARE: Thank you.

6 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 11th day of May, 2011.



Linda Ferrara

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